



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

MATTHEW J. CULLEN

**Complainant,
and**

**NATIONAL METAL PRODUCTS, DIVISION
OF NATIONAL MATERIAL L.P. and TANG
INDUSTRIES,
Respondent.**

)
) **Charge No:1994CA 0260**
) **EEOC No: 21B933049**
) **ALS Nos: 9874**
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RECOMMENDED LIABILITY DETERMINATION

On March 31, 1997, The Illinois Department of Human Rights (Department) filed a Complaint on behalf of Complainant alleging Respondent discriminated against him on the basis of age in violation of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (Act). A public hearing was held on September 17 and 18, 2002. At the conclusion of the hearing, the Parties were ordered to submit closing briefs. The Parties have done so. This matter is ready for decision.

CONTENTIONS OF THE PARTIES

Complainant contends Respondents unlawfully discriminated against him on the basis of age when they assigned him impossible work tasks to complete and created working conditions so intolerable that Complainant was compelled to resign. Respondents deny that they discriminated against Complainant because of his age and further contend that Complainant voluntarily retired.

FINDINGS OF FACT

Those facts marked with an asterisk are facts to which the Parties stipulated or facts that were admitted in the pleadings. The remaining facts were determined to have been proven by a preponderance of the evidence. Assertions made at the public hearing that are not addressed herein were determined to be unproven or immaterial to this decision.

1. Complainant filed a *Charge of Discrimination* with the Department August 5, 1993.
2. Complainant was born February 24, 1931.
3. Complainant's age at the time of filing the initial Charge with the Department was 62 years.*
4. Complainant has an undergraduate degree in Business Administration from DePaul University and has earned credit toward a Master's degree in Business

- Administration from the University of Chicago during 1955-1957. In the 1970's, Complainant earned a 2-year certificate in data processing from Harper College.
5. Complainant was hired by National Metal Products (NMP) around June 1, 1977.
 6. When first hired, Complainant's position was Administrative Assistant.
 7. Complainant was promoted to Controller of NMP in 1982.
 8. Jack Garvey (Garvey) was President of NMP for fourteen years until around July 1991 when he left the company.
 9. When Complainant was promoted to Controller, Garvey sent him to see Dick Shultz (Shultz), whom Complainant believed to be the son-in-law of Cyrus Tang. Shultz was in charge of National Laminations Corporation. Shultz interviewed Complainant and instructed him on his responsibilities. Shultz told Complainant that Complainant was responsible to Shultz and to Tang Industries.
 10. Shortly after Complainant was promoted to Controller, Complainant met with Garvey in Garvey's office. Garvey told Complainant that Complainant was to work with Tang Industries and do what ever Tang Industries requested him to do and that Tang Industries was responsible for the final instructions given to him.
 11. Cyrus Tang formed Tang Industries around 1966 as a steel service company and is its President and CEO. Tang Industries was and/or is a division of TMS. The TMS acronyms stand for Tang Material Service Company.
 12. During Complainant's tenure with the company, the organizational structure changed extensively; other companies were bought and sold by the Tang organization and some of the incorporated companies became limited partnerships.
 13. Tang Industries is the parent company of several other companies or divisions.
 14. Some of these other companies and/or divisions are: National Metal Products; National Coating; National Material Corporation located in Elk Grove Village, Illinois; Scrap Corporation located in Elk Grove Village, Illinois; National Lamination in Des Plaines, Illinois; National Material Corporation in East Chicago, Indiana; Lake Power Systems in Beloit; Cannon Ball Industries initially located in Harvey, Illinois and then in Beloit; National Material Corporation located in Michigan.
 15. As Controller, Complainant visited and worked at various offices of Tang Industries to accumulate data and meet with other employees for work- related reasons.
 16. Some of the offices Complainant visited and worked at were National Material Corporation in Elk Grove Village; Scrap Corporation in Elk Grove Village; the Tang Industries corporate office in Elk Grove Village; National Lamination Corporation in Des Plaines; National Material Corporation in East Chicago; Lake Power Systems in Beloit; Cannon Ball Industries in Harvey and then in Beloit; and National Material Corporation in Michigan state.
 17. Complainant visited the Tang Industries corporate offices at least once a week and at times he would visit 3-4 times in the same day for work- related reasons.
 18. Complainant communicated on the telephone with corporate employees at Tang Industries a couple of times a day.
 19. The Cannon Ball company was purchased by Tang Industries sometime shortly after Complainant was hired. Complainant had played a key role in negotiating a purchase price with Cannon Ball stockholders, along with Carl Zemenick, (Zemenick) a Tang Industries official, and Garvey. When negotiations were

- unsuccessful, Cannon Ball fell into bankruptcy and Tang Industries purchased it as part of the bankruptcy proceedings. Zemenick appointed Complainant as Controller of Cannon Ball following the acquisition.
20. Complainant remained Controller of NMP.
 21. As part of his duties as Controller, Complainant prepared a monthly statement and a portion of that statement was sent directly to Cyrus Tang. If the statement was late, Cyrus Tang's secretary would contact Complainant about the status of the statement.
 22. Jack Sorenson (Sorenson) was the Chief Corporate Controller for Tang Industries.
 23. Complainant worked with Sorenson extensively, attended meetings with him, and regularly discussed the reporting format with him so that Sorenson would have the appropriate information from Complainant to prepare the final Tang Industries report.
 24. Complainant would attend quarterly meetings of a gathering of all controllers from all of Tang Industries' companies. Generally these meetings were held at the Tang Industries corporate office conference room.
 25. Before Garvey left NMP, he wrote a letter praising the work of Complainant on July 30, 1991.
 26. In January or February 1992, after Garvey had left NMP, John Piotrowski (Piotrowski) took Garvey's place.
 27. Piotrowski was in his early forties when he took the place of Garvey.
 28. Piotrowski's title was General Manager for NMP.
 29. In early 1993, Piotrowski told Complainant that he wanted to hire one of his former employees, Charles Cunningham, (Cunningham) and ordered Complainant to lay off the "older" of his clerks so he would have an open position.
 30. At the time, two clerks reported to Complainant and both were in their late 50's or early 60's.
 31. Complainant protested that the older of his clerks was the only one familiar with the process of implementing the data processing systems; however, Piotrowski insisted Complainant follow his orders and lay off the oldest clerk and Complainant complied with this directive.
 32. Cunningham was in his thirties when he was hired by Piotrowski to work at NMP.
 33. NMP was in the business of contract manufacturing.
 34. Piotrowski defines NMP as a business that manufactured components or products for other companies. Specifically, NMP manufactured products for automotive and lighting companies and suppliers. Mostly, NMP manufactured interior noncosmetic parts, such as chassis parts and interior automotive door parts.
 35. NMP was a division owned by National Materials Limited Partnership.
 36. Piotrowski reported to Rudy Del Boccio, Group Vice President.
 37. In Piotrowski's position as General Manager for NMP, five people reported to him, including: Sales Manager, Ray Hussman; Materials Manager, Jane Lavigni; Matt Cullen (Complainant), Controller; Sheldon Kaplan and another person, engineers.
 38. Piotrowski expected Complainant, as Controller, to be "the financial ears and eyes of the general manager," to implement systems, to ensure that systems worked correctly, to bring financial problems to light and make suggestions to fix them, and to keep the books in accordance with the proper accounting standards.

39. At the time Piotrowski was hired, NMP had been experiencing economic problems and profit loss and Piotrowski was hired to make the company profitable.
40. The condition of NMP the time of Piotrowski's hiring was that the company was in bad shape; there were very few sales and marketing efforts in place; the equipment was in desperate need of repair and falling apart; the facilities were deteriorating; and the management team was not motivated.
41. Piotrowski had full authority to hire a management team, market the product, and create procedures and policy to establish a profitable organization.
42. In his first year as General Manager of NMP, Piotrowski thought Complainant to be a "good, solid accountant, bookkeeper," but unable to implement the managerial portion of the job, unable to delegate duties to subordinates, and unable to suggest improvements to systems and cost problems.
43. In February 1993, Piotrowski issued written short-term objectives to his staff, including Complainant.
44. Complainant's written short term goals issued by Piotrowski were: "install Financial and Manufacturing Systems adequate to properly plan, control and monitor the daily operations of NMP."
45. Wayne Hannah (Hannah) was an assistant to Michael Tang and was Acting Temporary General Manager of NMP prior to Piotrowski's hiring.
46. Michael Tang is Cyrus Tang's son and was promoted to President of National Material L.P. around 1990.
47. Complainant had previously been issued other objectives by Hannah prior to Piotrowski being hired.
48. In 1991, Complainant discussed with Hannah the objectives Hannah had assigned to him.
49. These assigned objectives were within Complainant's area of responsibility.
50. The goals from Hannah were: "1. Put NMP on a cost accounting system no later than September 30, 1991. 2. Establish a budget for 1992 based on the cost accounting standards developed in (1) above by November 30, 1991. NOTE: This date is subject to change. 3. Work with Maryelle Mason to investigate, recommend, develop and implement a system for tracking raw materials- the system should be integrated with the other cost accounting systems. Complete by January 1, 1992. 4. Distribute daily reports that currently exist to the staff by July 19, 1991, Solicit feedback by August 9, 1991. Define and implement improvements by September 13, 1991."
51. Sheldon Kaplan (Kaplan) was born October 6, 1928.
52. Kaplan began working for Tang Industries in 1977 and then worked for National Metal Products from 1980 until 1994.
53. Kaplan retired from Respondents March 7, 1994 when he was 65 years old.
54. Piotrowski was Kaplan's supervisor in 1992-1993.
55. At the time he retired, Kaplan's position was Production Engineering Manager.
56. After Kaplan retired in March 1994, Piotrowski called him back to work for approximately 1½ weeks in 1995 as a contract employee to assist with straightening out records and information to assist NMP in the process of shutting down.
57. During 1992 or 1993, Piotrowski told Kaplan several times "you are getting too old for this job; why don't you quit?"

58. During this same time period, Kaplan heard Piotrowski make similar comments to Complainant.
59. Kaplan's office was next door to Complainant's office in 1992-1993.
60. Sometime in 1993, Piotrowski was in Kaplan's office criticizing Kaplan's performance. During this criticism, Piotrowski told Kaplan in a loud voice that Kaplan was getting old and if he didn't like it he should leave the company.
61. Complainant's office was immediately next to Kaplan's office and Complainant could hear what was going on in Kaplan's office if the voices were raised.
62. In early 1993, Complainant heard Piotrowski make comments in Kaplan's office stating, "you are too old; get out; why am I putting up with you?"
63. On April 29, 1993, Piotrowski told Complainant he wanted a data processing system installed and operational by the end of April; when Complainant protested that the end of April was only two days away and that he could not possibly complete the job in two days, Piotrowski stated that he already knew that the job could not be completed in two days, but that Complainant should get started on it.
64. Complainant received a Performance Review from Piotrowski dated April 29, 1993 and signed by Complainant May 10, 1993, rating Complainant as "Unsatisfactory" in overall job performance.
65. In the Performance Review, Piotrowski commented that Complainant did not meet his assigned short-term goals and indicated that Complainant must demonstrate a substantial increase in performance with-in the next 30 days or risk termination. (Emphasis in the document).
66. In early May 1993, Piotrowski told Complainant in Piotrowski's office during Complainant's annual evaluation that he wanted to get the company management out of the 50's and into the current mode and that Complainant did not fit his view of a Controller. When Complainant asked Piotrowski to explain that statement, Piotrowski replied that he wanted somebody "younger" and "more vigorous."
67. Complainant made a written response to the negative Performance Review on May 11, 1993, disputing most of the comments made by Piotrowski in the evaluation.
68. Piotrowski gave Complainant a written reply to his response dated May 12, 1993 essentially disagreeing with the points in Complainant's response.
69. Piotrowski summoned Complainant into his office approximately one week following Complainant's May 11, 1993 response and told Complainant he objected to his response and that if he didn't like it, he could quit and if he didn't shape up, he would fire him.
70. After this meeting, Complainant then telephoned Michael Tang and told him that Piotrowski had given him a failing evaluation, that Piotrowski wanted to replace him with somebody younger and more vigorous, that he needed his job and that he was requesting a transfer. Michael Tang advised Complainant to call Curt Swanson (Swanson) and work things out with him.
71. Swanson was Corporate Controller for Tang Industries in 1993.
72. At that time, Swanson reported to Michael Tang.
73. Swanson was employed by Tang Industries in January 1984 as Assistant to President Cyrus Tang. Around 1990, Swanson became Corporate Controller for Tang Industries.
74. After Michael Tang referred Complainant to Swanson, Complainant went to the Tang corporate office and spoke with Swanson. Complainant told Swanson that

- Piotrowski wanted to get rid of him; that Piotrowski had told him he wanted someone younger and more vigorous; that he needed a job; and requested Swanson to transfer him to another Tang entity. Swanson told Complainant that he would try and find a place to transfer him.
75. On July 8, 1993, Complainant wrote a letter to Swanson and sent it by interoffice mail delivery reiterating his interest in other possible openings in the Tang organization, stating that Piotrowski had told him that he was “not [my] kind of Controller,” and theorizing that this comment was prompted by his age.
 76. Complainant desired to continue working for Tang Industries or one of its subsidiaries.
 77. Neither Swanson nor Michael Tang made any investigation or other inquiry into Complainant’s concern that Piotrowski harbored age bias against Complainant.
 78. As Corporate Controller, all division controllers reported indirectly to Swanson, including Complainant, who was Controller of NMP.
 79. After August 5, 1993, Complainant felt that his and Piotrowski’s relationship deteriorated.
 80. During weekly management meetings, Piotrowski would find problems with Complainant’s progress reports on various projects and tell him his reports were “no good” or “that’s another strike.”
 81. In October 1993, Dale Labonti (Labonti) was Controller of National Lamination Corporation, a division of Tang Industries.
 82. In late October 1993, Complainant, Labonti, and Swanson met in Labonti’s office and discussed the reorganization of the duties of the accounting departments and the changes Labonti wanted to implement.
 83. Complainant objected that the changes would increase his workload and complained that Piotrowski had already overloaded him with work.
 84. At that time, Swanson was not contemplating discharging Complainant and expected that Complainant would remain employed with one of the Tang subsidiaries.
 85. No one in NMP had suggested or recommended to Swanson that Complainant be terminated during October 1993 or any time prior to that.
 86. Sometime between August 1993 and November 1993, Complainant met with Piotrowski in Piotrowski’s office while Piotrowski wrote a written reprimand to Complainant for his handling of an order entry. During that meeting, Piotrowski told Complainant that Complainant could keep “begging” for his job but he intended to continue writing him up like this every opportunity he had.
 87. Complainant resigned NMP on November 1, 1993.*
 88. When Complainant resigned, he went to Piotrowski’s office in Bensenville, Illinois and said “John, you finally won; I give up; I can hardly talk without stuttering; my blood pressure is up; I have got a rash; I can’t take it anymore; I am not going to beg anymore; you win; I quit.” Piotrowski replied, “Fine, we will write that up.”
 89. After Complainant resigned, his position was absorbed into the controller function at National Lamination Corporation.
 90. The decision to merge the functions was made by the chief financial people at the corporate level of Tang Industries.
 91. SKD Automotive Group (SKD) was a wholly owned subsidiary of Tang Industries that was interested in purchasing NMP.

92. Around October 1995, SKD consolidated NMP and NMP became a part of SKD.
93. NMP closed November 1995 because of insufficient sales.
94. When this happened, some employees were offered jobs at National Lamination Corporation; Piotrowski was offered a job as General Manager at SKD; and most of the other employees were laid off.
95. Respondent paid for medical insurance for Complainant and his family while he was employed by NMP.
96. After resigning from NMP, Complainant incurred expenses for replacement medical insurance.
97. After Complainant resigned, he received a "Coverage Termination Notice" dated February 5, 1994 from The Travelers Plan Administrators of Illinois, Inc., the administrator of Complainant's post-termination COBRA medical plan. The notice indicated "Employer: Tang Industries, Elk Grove, Vlg, IL."
98. Complainant sustained emotional distress as a result of being constructively discharged from NMP.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 5/1-103(B) of the Act.
2. Respondent National Metal Products, Division of National Material, L.P. is an "employer" as defined by section 2-101(B)(1) of the Act and is subject to the provisions of the Act.
3. Respondent Tang Industries is an "employer" as defined by section 2-101(B)(1) of the Act and is subject to the provisions of the Act.
4. Complainant was employed by National Metal Products, Division of National Material L.P., and by Tang Industries.
5. The Commission has jurisdiction over the Parties and subject matter of this action.
6. Complainant proved by a preponderance of the evidence that Respondents discriminated against him on the basis of his age.
7. Complainant proved by a preponderance of the evidence that Respondents deliberately made working conditions so intolerable for him that he was compelled to resign despite his desire to continue working.
8. As a result of Respondent's discriminatory conduct, Complainant suffered actual damages of lost wages.
9. As a result of Respondent's discriminatory conduct, Complainant suffered actual damages of lost medical benefits.
10. As a result of Respondent's discriminatory conduct, Complainant suffered actual damages for emotional distress.

DETERMINATION

The evidence sustains Complainant's Complaint that Respondents, National Metal Products, Division of National Material L.P., and Tang Industries, discriminated against him on the basis of unlawful age discrimination and made Complainant's working conditions so intolerable for him that he was compelled to resign despite his desire to continue working.

DISCUSSION

Preliminary Issues

Respondent's Motion to Strike Complainant's Post-Hearing Brief

In response to Respondent's February 24, 2003 motion to strike Complainant's Post-Hearing Brief and Proposed Findings, I entered an order March 13, 2003 striking all pleadings after the Complainant's 10-page Post-Hearing Brief and the first 5 pages of Complainant's Proposed Findings of Fact and Conclusions of Law, filed January 27, 2003. Pursuant to that order, I have not read or otherwise reviewed any pleadings so stricken pursuant to that order.

Retaliation Cause of Action

Complainant's public hearing evidence and post-hearing brief attempt to argue a claim of retaliation. There are no allegations in the Complaint that Complainant engaged in some protected activity from which to infer a retaliation charge. As the Complaint does not plead a charge of retaliation, I am precluded from entertaining any evidence or argument as to a retaliation cause of action.

Respondent's Contention that "Tang Industries" is Not a Proper Party to this Complaint because Complainant was not employed by Tang Industries

The record indicates that Respondent filed *Tang Industries Inc. Motion to Dismiss Complaint of Civil Rights Violation* on June 19, 1997. Complainant filed an *Opposition to Tang Industries, Inc.'s Motion to Dismiss Complaint of Civil Rights Violation* on July 21, 1997. Both Parties submitted an Affidavit with their respective pleadings. On September 2, 1997, Administrative Law Judge Sandra J. Lebold issued an order denying Respondent's motion, stating "A definitive finding cannot be made on the written record and a general issue of material fact exists as to Tang Industries Inc.'s status as a Respondent in this matter."

As this issue was listed as a contested fact in the *Parties' Joint Prehearing Memorandum* filed November 28, 2000, it is apparent that this issue remains unresolved and should be decided on the record. Complainant maintains he was employed by both, National Metal Products, a division of National Materials, L.P and Tang Industries, during all relevant times. Respondent contends Complainant was never an employee of Tang Industries.

In order for the Commission to obtain jurisdiction over the Complaint, the Parties must possess the relationship of employer and employee as intended by the Act. **Faulkner-King v. Dep't. of Human Rights**, 225 Ill.App. 3d 784, 587 N.E.2d 599 (4th Dist. 1992). Respondent Tang Industries has maintained that Complainant was never an employee of Tang Industries. Whether the complainant is an "employee" is a recurring question in matters before the Commission; however, it is usually based on the relationship between the Parties concerning whether the worker should be characterized as an "employee" or an "independent contractor." Here, the issue varies a little because it is undisputed that Complainant is an employee; the squabble concerns by whom he was employed.

The definition of “employee” in the Act is “Any individual performing services for remuneration within this State for an employer...” section 5/2-101(A). None of the witnesses, including Complainant, Piotrowski, Swanson or Kaplan, gave testimony demonstrating confidence in articulating the organizational structure of Tang Industries and its many subsidiaries. However, the record is replete with examples of Tang Industries’ conduct demonstrating that Tang Industries exercised control over Complainant and his job duties as Controller of NMP and this control reflected a practice of treating the employees of Tang Industries’ subsidiaries as employees of the parent company. See **F & E Erection Company v. The Industrial Commission**, 162 Ill App. 3d 156, 514 N.E. 2d 1147 (5th Dist 1987).

A short review of the historical background of Respondents somewhat explains the confusion. Cyrus Tang formed Tang Industries around 1966 as a steel service company and is its President and CEO. The record supports that Tang Industries is a parent company of several companies and divisions and was or is itself a division of TMS. The TMS acronyms stand for Tang Material Service Company. During Complainant’s tenure with the company, the organizational structure changed extensively; other companies were bought and sold by the Tang organization; and some of the companies became limited partnerships or were organized in some other legal business fashion.

When Complainant was promoted to Controller of NMP, Garvey sent him to see Shultz, whom Complainant believed to be the son-in-law of Cyrus Tang. Shultz was in charge of National Laminations Corporation. Shultz interviewed Complainant and instructed him on his responsibilities. Shultz told Complainant that he was responsible to Shultz and to Tang Industries.

Shortly after Complainant was promoted to Controller, Complainant met with Garvey in Garvey’s office. Garvey told Complainant that Complainant was to work with Tang Industries and do what ever Tang Industries requested him to do and that Tang Industries was responsible for the final instructions given to him.

Although Complainant regularly reported to work at the NMP office in Bensenville, Illinois, Complainant’s job duties as Controller required him to frequently visit various subsidiary offices of Tang Industries to gather information he needed to perform his job duties. Complainant would regularly visit National Material Corporation in Elk Grove Village, Illinois; Scrap Corporation also in Elk Grove Village, Illinois; National Laminations Corporation in Des Plaines, Illinois; National Material Corporation in East Chicago, Indiana; Lake Power Systems in Beloit; National Material Corporation in Michigan and Cannon Ball Industries, initially located in Harvey, Illinois, then in Beloit. Complainant also visited the Tang Industries corporate offices in Elk Grove Village, Illinois at least once a week; however, there were times he would make 3-4 visits there during the same day. In order to perform his job duties, Complainant would communicate by telephone with employees at Tang Industries’ corporate offices a couple of times a day.

The Cannon Ball company was purchased by Tang Industries sometime shortly after Complainant was hired. Complainant had played a key role in negotiating a purchase

price with Cannon Ball stockholders, along with Carl Zemenick, (Zemenick) a Tang Industries official, and Garvey. When negotiations were unsuccessful, Cannon Ball fell into bankruptcy and Tang Industries purchased it as part of the bankruptcy proceedings. Zemenick appointed Complainant as Controller of Cannon Ball following the acquisition.

As part of his duties as Controller, Complainant prepared a monthly statement and a portion of that statement was sent directly to Cyrus Tang. If the statement was late, Cyrus Tang's secretary would contact Complainant on behalf of Cyrus Tang about the status of the statement and Complainant would make arrangements to deliver it to her.

The payroll information for all executives, including Complainant, was handled through National Laminations Corporation. Jack Sorenson (Sorenson) was the Chief Corporate Controller for Tang Industries. Complainant worked with Sorenson extensively, attended meetings with him, and regularly discussed the reporting format with him so that Sorenson would have the appropriate information from Complainant to prepare the final Tang Industries report. Complainant would attend quarterly meetings of a gathering of all controllers from all of Tang Industries' companies. Generally, these meetings were held at the Tang Industries corporate office conference room.

After Complainant resigned in 1993, he received a "Coverage Termination Notice" dated February 5, 1994 from The Travelers Plan Administrators of Illinois, Inc., the administrator of Complainant's post-termination COBRA medical plan. The notice indicated "Employer: Tang Industries, Elk Grove, Vlg, IL."

Complainant had received a letter from TMS Corporation dated September 10, 1979, from Frank D. Sove, President, indicating the company had made a contribution to the TMS Profit Sharing and Retirement Plan and that Complainant's personal account would benefit from that contribution.

In analyzing whether Complainant was an employee of Tang Industries, I find the Illinois Supreme Court decision in **Bob Neal Pontiac-Toyota, Inc., v. The Industrial Commission**, 89 Ill.2d 403; 433 N.E.2d 678; 60 Ill.Dec. 636 (1982) helpful. In **Neal**, the Court set out various factors to be considered in determining whether a worker's status is that of independent contractor or employee. Among these factors are the amount of control and supervision; the right of discharge; the method of payment; the skill required in the work to be done; the source of tools, material or equipment; and the work schedule. The court said that the right to control the manner in which the work is done is the most important factor.

Accordingly, in **Cooksley and Korlec, Inc.**, __ Ill. HRC Rep. __, (1989CA3493, November 17, 1999), the Commission agreed with the Administrative Law Judge's (ALJ) analysis that determined complainant was an employee (rather than an independent contractor) for respondent Korlec, Inc. (Korlec), a holding company, *and* for a legally independent company named Korhumel Steel, which was owned by Korlec. The Commission held that, although complainant's salary was paid by Korhumel Steel, that salary included remuneration for work performed for the respondent, Korlec. The complainant had performed services for respondent Korlec and for Korhumel Steel, in that complainant maintained the respondent's checkbook, signed the company's

paychecks, and filed necessary forms with the Illinois Department of Employment Security. Further, complainant reported to the president of Korhumel Steel, who was also the president of respondent, Korlec. Thus, the Commission agreed with the reasoning of the ALJ that the respondent exercised control and supervision over complainant and that the president had the right to discharge complainant on the company's behalf. Therefore, respondent's argument, that although complainant was an employee of Korhumel he was merely an independent contractor *vis-à-vis* Korlec, was rejected.

Although the issue here is a variation of the issue in **Neal** and **Korlec**, since independent contractor status is not argued by the Parties, the factual analogy is clear. The facts support that Tang Industries reserved the right "to control the manner in which the Complainant's work was done" – the most important consideration in defining "employee" status articulated by the high state court in **Neal**. Tang Industries had control over Complainant in that a substantial portion of Complainant's work product was responsible to and interconnected with Tang Industries. Complainant worked extensively with the Chief Corporate Controller of Tang Industries concerning his NMP and Cannon Ball reports, which were used to compile the final Tang Industries report. Complainant had extensive contact with personnel at the Tang Industries Corporate Office and regularly visited there to obtain and disseminate information pertinent to his work product.

Further, Complainant regularly visited the offices of several other Tang subsidiary companies in order to gather information for his reports. Also, Complainant was told by Shultz and Garvey that he was responsible to Tang Industries and -- when Complainant's reports were not timely completed -- he would be contacted directly by Cyrus Tang's office (Cyrus Tang is President and CEO of Tang Industries), which suggests that Tang Industries' President exercised some control and supervision over Complainant. Additionally, Complainant's COBRA benefits plan notification indicated Tang Industries as the employer for Complainant's benefits. Thus, the record supports Complainant was an employee of both, National Metal Products and Tang Industries. Wherefore, Tang Industries is a proper party to this Complaint.

Age Discrimination

A Complainant bears the burden of proving discrimination by a preponderance of the evidence, in accordance with the Act at section 8A-102(I). Complainant may do so by presenting direct or indirect evidence. **K-Mart Corp. v. Illinois Human Rights Commission**, 129 Ill.App.3d 842, 473 N.E.2d 73, 84 Ill.Dec. 857 (4th Dist. 1987).

Typically, in cases alleging age discrimination, the Commission has applied a three-step analysis to determine whether there has been a violation of the Act. **McDonnell Douglas Corp. v. Green**, 411 U.S. 793, 93 S.Ct. 1817 (1973) and **Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 101 S. Ct. 1089 (1981), adopted by the Illinois Supreme Court in **Zaderaka v. Illinois Human Rights Commission**, 131 Ill.2d 172, 545 N.E.2d 684 (1989). Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once respondent successfully makes this articulation, the presumption of unlawful discrimination drops

and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination. The latter requirement merges with the complainant's ultimate burden of proving that the respondent unlawfully discriminated against complainant.

Complainant claims Respondent constructively discharged him. Constructive discharge occurs when an employer deliberately makes working conditions so intolerable, difficult or unpleasant that a reasonable person in the employee's position would feel compelled to resign. **Steele v. Illinois Human Rights Commission**, 160 Ill. App. 3d 577, 513 N.E.2d 1177, 112 Ill. Dec 568 (3rd Dist. 1987). The elements of a *prima facie* case of constructive discharge are as follows: 1) Complainant is a member of a protected group; 2) he was subjected to difficult or unpleasant working conditions; 3) a reasonable person in his position would have felt compelled to resign. **Brewington v. Dept. of Corrections**, 161 Ill. App. 3d 54, 513 N.E.2d 1056 (1st Dist. 1987); **Powell and Brown Shoe Co.**, 15 Ill. HRC Rep. 27 (1985); **Gardner and Greater Peoria Mass Transit Dist.**, 17 Ill. HRC Rep. 165 (1985).

Complainant presented evidence of the working conditions he was subjected to because of Piotrowski's age animus. Complainant credibly testified that Piotrowski regularly made age-disparaging comments to him and Kaplan in the workplace, verbally urging both of them to quit because they were too old, and telling Complainant that he wanted a "younger, more vigorous" Controller. Kaplan, too, credibly testified that Piotrowski made age-disparaging comments in the workplace directed toward himself and Complainant.

Kaplan's testimony corroborated Complainant's testimony of Piotrowski's age animus. Kaplan credibly testified that, in 1993, Piotrowski was in his office criticizing his performance when Piotrowski made comments to him in a loud voice that Kaplan was getting old and if he didn't like it, he should leave the company. In 1992 or 1993, on more than one occasion, Kaplan heard Piotrowski make comments directed toward himself and to Complainant stating "You are getting too old for this job; why don't you quit?" Kaplan's office was next door to Complainant's office and Kaplan heard these comments being spoken to Complainant by Piotrowski through the wall separating his and Complainant's office. Piotrowski made these comments directed to Kaplan while Kaplan and Piotrowski were in Kaplan's office.

Complainant credibly testified that, in early 1993, Piotrowski told him that he wanted to hire one of his former employees, Cunningham, whom Piotrowski characterized as a computer whiz; however, he was unable to make any personnel additions, so he wanted to eliminate a current employee in order to hire Cunningham. Piotrowski ordered Complainant to layoff the older of his clerks so he could hire Cunningham. At the time, two clerks reported to Complainant and both were in their late fifties or early sixties. Complainant protested that the oldest clerk was the one working directly on his data processing implementation programs and that laying her off would set his implementation schedule back. However, Piotrowski ignored Complainant's concerns and ordered Complainant to follow through with his orders and lay her off. Complainant complied and laid off the older of the two clerks. Piotrowski hired Cunningham.

Complainant further credibly testified that, early in 1993, he heard Piotrowski say to Kaplan in Kaplan's office "you are too old; get out; why am I putting up with you?" In May 1993, while Complainant was in Piotrowski's office discussing his annual evaluation, Piotrowski told Complainant that he wanted to get company management out of the 50's and into the current mode and that Complainant did not fit his view of a controller. When Complainant asked Piotrowski to explain, he replied that he wanted somebody "younger" and more "vigorous."

Piotrowski, who testified by evidence deposition, was not questioned on any of the specific age-related comments testified to by Kaplan or Complainant; however, he did deny having ever made any discriminatory remarks regarding anyone's age during his employment at Respondent.

I give the testimony from Kaplan and Complainant on the specific age-related comments made by Piotrowski more weight than Piotrowski's general denial. I was present for Piotrowski's evidence deposition -- which was taken prior to the public hearing-- and was able to observe his demeanor, just as I observed the demeanor of Kaplan and Complainant during the public hearing. I find Complainant's and Kaplan's testimony of Piotrowski's age-biased comments to be detailed, specific and credible and Piotrowski's denial that he ever made any disparaging age-related comments unconvincing.

Further, Kaplan had retired from NMP in March 1994 and subsequently returned to NMP -- at the request of Piotrowski -- for a brief period of time as a contract worker to assist the company in closing down NMP. There was nothing in the evidence to suggest that Kaplan had any reason to lie and there was nothing in the record with which to infer that Kaplan's testimony was tainted by any bias against Piotrowski or the Respondents. Therefore, I found Kaplan's testimony substantiating Complainant's claim that Piotrowski made age-disparaging comments compelling and credible. This conduct from Piotrowski constitutes direct evidence, which operated to make Complainant's working conditions intolerable, difficult and unpleasant.

In order to complete the *prima facie* showing, Complainant must prove that Respondent made his working conditions so intolerable that no reasonable person would remain in his position. **Brewington, supra**. An employer will be held liable for discrimination as if it had actually terminated the employee when it deliberately makes an employee's working conditions so intolerable that the employee is compelled to resign despite his or her desire to continue working. Unless confronted with an aggravated situation beyond ordinary discrimination or a continuous pattern of discriminatory treatment, an employee is expected to remain on the job while contesting alleged discriminatory action by his employer. **Steele, supra**, citing **Bourque v. Powell Electrical Manufacturing Co.**, 617 F.2d 61 (5th Cir. 1980). The Commission has not required that the employee prove his employer intended to force his resignation. Instead, the Commission analyzes the reasonableness of a resignation in view of the working conditions. **Brewington, supra**.

The question of what a reasonable person would do is a question of fact and normally should be left for the trier of fact. **Bailey v. Binyou**, 583 F. Supp. 923, 929 (N.D. Ill. 1984). Application of this "reasonable person" test involves complex questions of fact, including, inter alia, the nature of the working conditions, their difficulty or

unpleasantness, and what a reasonable person would or would not do under such conditions.” **Bernstein v. Consolidate Foods Corp.**, 622 F.Supp. 1096, 1101 (N.D. Ill. 1984).

For approximately 5 years, from 1977 –1982 when Complainant worked as an Administrative Assistant, and 10 years, from 1982 - 1992 when Complainant worked as a Controller, he received no criticisms, reprimands or negative performance appraisals for poor performance. Garvey was the President of NMP for 14 years and left the company in January or February 1992. Before he left, he wrote a recommendation letter on July 30, 1991 and gave it to Complainant. The letter commended Complainant’s work as Controller of NMP and of Cannonball and characterized Complainant as “extremely competent, reliable and resourceful” and “an asset to any company he joins.”

After Piotrowski became Complainant’s supervisor in January or February 1992, his age animus became apparent. In 1992 or 1993, while in the workplace, Piotrowski would make age-disparaging comments to Complainant and Kaplan out loud for anyone to overhear. In early 1993, Piotrowski communicated his desire to hire a younger former employee of his who was in his thirties. Piotrowski ordered Complainant to lay off the older of his clerks to create an open position so Piotrowski could slot his new prospective hire. Although Complainant objected, he followed Piotrowski’s orders and laid off his oldest clerk and Piotrowski hired the younger worker.

Piotrowski gave Complainant a negative written performance appraisal dated April 29, 1993, indicating that Complainant must demonstrate a “substantial increase” in performance within the next 30 days or risk termination. Prior to this performance evaluation, Complainant had received no reprimands or other performance criticism throughout his tenure with NMP.

Complainant met with Piotrowski in May, 1993 to review his April 29, 1993 performance appraisal. During that meeting, Piotrowski told Complainant he did not fit his view of a controller and that he wanted somebody younger and more vigorous.

Subsequent to the April 29, 1993 negative performance appraisal, Piotrowski began making written memorializations of criticisms of Complainant’s performance. Complainant received a written criticism from Piotrowski on August 30, 1993 regarding his failure to transfer a sufficient amount of funds to an account prior to his going on vacation. Complainant received a memorandum dated September 13, 1993 from Piotrowski criticizing him for failing to list an order in the Back Order Report, terming this misstep a “very serious mistake.” Complainant received a memorandum from Piotrowski dated September 14, 1993 criticizing him for failing to follow the procedure of using yellow paper for original sales orders, which procedure had become effective June 25, 1993 – a procedure Complainant had developed to bring attention to the sales order for the purpose of prompting action. Complainant received a memorandum dated September 14, 1993 from Piotrowski requiring Complainant to explain why he had used an outdated part number causing NMP to manufacture parts for which the company had no order.

After the April 1993, negative performance appraisal, Complainant felt his discharge by Piotrowski was imminent, so he met with Curt Swanson, (Swanson) Corporate Controller, in May 1993. Complainant told Swanson that he was having problems working with Piotrowski and inquired about other positions with the organization. Swanson assured Complainant he would “keep an eye out” for other positions. Complainant followed up that meeting with a letter to Swanson, dated July 8, 1993, reiterating his interest in other possible openings within the organizational structure and theorizing that Piotrowski was not pleased with his performance because of his age.

Although Complainant alerted Swanson of his concern that he was having problems working with Piotrowski because of Piotrowski’s age bias, Swanson conducted no investigation into Complainant’s concerns and -- although Swanson reported directly to Michael Tang, the President of NMP -- Swanson did not inform Michael Tang of Complainant’s concern that he suspected his problems with Piotrowski may have been motivated by Piotrowski’s age bias. Similarly, Michael Tang made no inquiry into Complainant’s concern that Piotrowski harbored age bias against him.

Sometime between August 1993 and November 1993, Complainant met with Piotrowski in Piotrowski’s office while Piotrowski wrote a written reprimand to Complainant for his handling of an order entry. During that meeting, Piotrowski told Complainant that Complainant could keep “begging” for his job but he intended to continue writing him up like this every opportunity he had.

In November 1993, Complainant went to Piotrowski’s office and told him “John, you finally won, I give up; I can hardly talk without stuttering, my blood pressure is up; I have got a rash; I can’t take it anymore; I am not going to beg anymore; you win; I quit.” Piotrowski replied “Fine, we will write that up.” Complainant then resigned.

In asking whether Piotrowski’s conduct made working conditions so difficult for Complainant that a reasonable person in Complainant’s shoes would have felt compelled to resign, the evidence in this matter supports an affirmative answer. Complainant was constantly urged by Piotrowski to quit because he was “too old.” Complainant would overhear Piotrowski making similar age-biased comments to Kaplan. Complainant had personal experience that Piotrowski was predisposed to consider age as a factor in a discharge decision because he had been ordered by Piotrowski to lay off the oldest of one of his own clerks. (Past discriminatory acts of an employer are evidence of a custom or policy or discrimination. **Herman and Mullaney v. National Broadcasting Company, Inc.**, 77 F.2d 604, 609-610 (7th Cir. 1984)). Piotrowski gave Complainant a negative performance appraisal and then began issuing Complainant written reprimands. The negative performance appraisal and written reprimands began after Complainant had amassed a nearly 15-year blemish-free record with Respondents. When Complainant protested this treatment to his superiors -- Michael Tang and Swanson -- and requested a transfer, neither did anything to investigate the allegations or otherwise address the age-bias issue and no transfer was ever offered to Complainant.

Complainant has proved a *prima facie* case of constructive discharge so as to require Respondent to explain its action as to Complainant’s resignation.

Respondent contends that Complainant's resignation was voluntary. Respondent argues that Complainant was already not meeting the performance of his job goals and was continuing to make errors in his job performance and that Complainant decided to resign after he had been given additional work by Labonti and Swanson, which he felt overloaded him. Respondent maintains that no management personnel had ever recommended Complainant's employment be terminated and -- at the time immediately prior to Complainant's resignation -- Swanson saw Complainant as a key part of the company's ongoing restructuring process and there were no plans to terminate Complainant's employment.

Respondent's position is inconsistent with the facts. Piotrowski had made threats to Complainant that he was prepared to discharge him, including in Complainant's April 29, 1993 Performance Review, and on May 11, 1993, when Piotrowski advised Complainant that if he didn't shape up he would fire him.

Further, although Complainant admitted to having made some errors and further admitted that he had not accomplished some of his job performance goals, Respondent's position that Complainant voluntarily resigned is inconsistent with the facts surrounding Michael Tang's and Swanson's response to Complainant's obvious cry for help prompted by Piotrowski's apparent age animus. On May 18, 1993, immediately after receiving the April 1993 negative performance appraisal, Complainant telephoned Michael Tang and complained to him that Piotrowski had given Complainant a negative performance appraisal. Complainant told Michael Tang that Piotrowski wanted to replace him with somebody younger and more vigorous, that he needed a job and that he was requesting a transfer. Tang advised Complainant to contact Swanson. Complainant went to Swanson's private office at the Tang corporate offices and had a person-to-person meeting with Swanson. Complainant told Swanson that Piotrowski wanted to get rid of him, that Piotrowski had told him that he wanted a younger, more vigorous controller, that he needed a job and asked if Swanson could transfer him to another Tang subsidiary. Swanson said he would look out for appropriate positions and get back to Complainant. Complainant followed up with Swanson by a letter dated July 8, 1993 reiterating his interest in other possible openings in the Tang organization and surmising in the letter that Piotrowski thought Complainant was "not his kind of controller" perhaps because of his age.

In response to Complainant's allegations that Piotrowski harbored age bias, Swanson did no investigation, initiated no dialog with Michael Tang regarding these allegations and took no steps to speak with Piotrowski about these allegations. Further, there was nothing in the record suggesting that Michael Tang conducted any investigation or other follow-up inquiry as to Complainant's allegations. Complainant appealed to Michael Tang and Swanson that he needed a job and was seriously seeking a transfer in order to remain employed and escape Piotrowski's age- biased wrath; however, Swanson could not or did not find an appropriate transfer for Complainant and four months after the July 1993 letter to Swanson, Complainant resigned. It is difficult for me to accept that -- in light of Complainant's diligence in pursuing a transfer in order to protect his job status -- Respondent reasonably believed Complainant would suddenly retire voluntarily.

In light of the aggregate of the conditions of the work environment thrust upon Complainant by Piotrowski and because Complainant's cries for help were virtually ignored by upper management, it is entirely supported that, although Complainant desired to continue working, a reasonable person would have felt compelled to resign.

DAMAGES

The purpose of the damage award is to make the Complainant whole. When the Complainant has been a victim of unlawful discrimination under the Act, he should be placed in the position he would have been but for the discrimination. **Clark v. Human Rights Commission**, 141 Ill. App. 3d 178, 490 N.E.2d 29 (1st Dist. 1986).

Backpay

Complainant submitted credible testimony that he attempted to mitigate his damages. Complainant sought full time employment after he left NMP in November 1993. He registered with Account Temps, a temporary accounting placement service; registered with the Illinois Department of Employment Security for assistance with his job search; and sent out over 200 resumes during the first eight to ten months of his unemployment status. Through Account Temps, Complainant was able to secure temporary assignments of one or two days. In 1998, Complainant accepted a temporary full time position through Account Temps with the DovenMuehle Mortgage Company. This position lasted for four months, after which Complainant was offered and accepted a permanent part time position with that company, where he remains employed.

A Complainant is presumptively entitled to full back pay from the date of the unlawful action. Complainant requests back pay from November 1, 1993 through the date of the public hearing. Complainant calculates the total wage loss through November 2000 as \$323,620.00 based on a calculation of a 5% per year pay raise.

Complainant has submitted no evidence to justify this back pay award nor to support that he would have received a 5% annual wage increase. Complainant's income tax forms for 1993 indicate that he earned \$27,110.55 in wages and salaries for 1993. Since Complainant left Respondent November 1, 1993 and testified that he was unemployed the remainder of 1993, I calculate Complainant's monthly salary at \$2,711.00 for an annual salary at \$32,532.00. Complainant made \$1,417.00 in wages for 1994 and no wages for 1995. Therefore, Complainant is entitled to \$5,422.00 in lost wages for 1993; \$31,115 for 1994; and \$31,177.00 for 1995.

I am not considering the salaries of Ben Sun, Tom O'Hara and Dale LaBounty, which were submitted as comparable salaries upon which to gauge Complainant's lost wages, because there was no evidence presented that any of these employees held a comparable position to Complainant. Although Swanson testified that Ben Sun was an accountant with National Lamination Corporation who was then assigned to take over as Controller of Cannon Ball at some time while Complainant was still working for NMP, the evidence shows that, from 1988 through 1993, Sun had been earning quite a bit more than Complainant. It is not clear what other positions Sun had held prior to taking over Complainant's responsibilities as Controller of Cannon Ball, but whatever his prior positions, he had a history of being paid much more than Complainant since 1988. For

instance, Sun made \$32,452.00 in 1988, \$34,008.00 in 1989, \$35,142.00 in 1990, \$35,832.00 in 1991, \$37,332.00 in 1992, \$39,608.00 in 1993 and \$41,042.00 in 1994. Further, it is unclear whether Sun's responsibilities at Cannon Ball were in addition to other responsibilities he simultaneously held.

Also, considering NMP was not in a profitable state in 1993 when Complainant resigned, it is not reasonable to conclude that Complainant would have been given a salary increase from his 1993 salary of \$32,500.00 to match Sun's 1994 salary of \$41,042.00. Therefore, Sun is not similarly situated to Complainant for a wage comparison.

The record supports that Complainant's damages should cease mid- November, 1995 when NMP was purchased by and its operations were merged into that of SKD. Due to the acquisition, some of the NMP employees were offered jobs at National Lamination Corporation; Piotrowski was offered a position as general manager of nonautomotive products at SKD; and most of the other NMP employees were terminated. Complainant's Controller position was consolidated with a lateral position at National Lamination Corporation.

Lost Benefits

Complainant contends he lost the equivalent in monetary value of certain benefits when he was constructively discharged. Complainant maintains he lost the value of group health, life, and disability insurance premiums; \$70,000.00 in deferred contributions; and that he incurred \$6,854.00 in unpaid medical expenses.

The record supports that Complainant made payments to the federal COBRA medical insurance benefit plan to replace his employer-paid insurance plan. The COBRA plan essentially mirrored his NMP medical benefits plan. Complainant paid COBRA \$426.60 per month for 18 months for a total of \$7,679.00. Complainant is entitled to reimbursement for this amount.

After his COBRA benefits plan expired, Complainant paid American Family Insurance \$561.00 in May 1995; \$561.00 in July 1995; \$539.10 in August 1995; \$561.00 in Oct 1995; and \$282.90 in December 1995 for medical insurance. Complainant is entitled to \$2,505.00 as reimbursement for this amount.

Complainant is not entitled to dental benefits, as NMP did not provide employer-paid dental benefits. Complainant is also not entitled to compensation of deferred contributions because these contributions were deducted from Complainant's salary, not in addition to his salary and NMP contributed no matching funds to this plan. Further, Complainant is not entitled to lost life and disability insurance premiums, as there was no evidence presented to establish he paid out funds to replace these benefits.

Complainant argues that he incurred medical expenses of \$6,854.00. Complainant presented no evidence that he would not have incurred these same expenses had he remained with NMP, since the COBRA plan paid benefits similar to the NMP plan and there was no evidence presented that the American Family Insurance plan was not a

similar plan. Therefore, Complainant is not entitled to reimbursement for medical expenses.

Emotional distress

Complainant requests \$20,000.00 in emotional distress damages. A damages award for emotional distress is appropriate in cases such as this one, where Complainant was subjected to demeaning conduct on an ongoing basis. **Bd. Of Fire and Police Commissioners v. Human Rights Comm'n**, 167 Ill App. 3d 384, 541 N.E. 2d 1248 (1st Dist. 1989). The measure of damages should be considered in light of the nature and duration of the suffering experienced by the Complainant, **Neace v. AAA-Chicago Motor Club**, 31 Ill HRC Rep. 54 (1984).

Complainant presented evidence of his emotional distress suffering as a result of his constructive discharge. During his resignation, Complainant told Piotrowski that he could hardly talk without stuttering; his blood pressure was up; he had developed a rash; and “I can’t take it anymore.” However, Complainant submitted no evidence that he sought medical attention or counseling for these specific medical conditions and presented no evidence of the extent or duration of the medical conditions or the emotional distress suffered. However, there is no doubt that Complainant suffered emotional distress and resulting physical problems due to Piotrowski’s conduct and Respondents’ refusal to address Complainant’s concerns.

In assessing the appropriate amount of emotional distress damages, I find the decision in **Holmes v. Chicago Board of Education**, __ Ill HRC Rep. __, (1993CF3190, September 2, 1998) helpful. In **Holmes**, the Commission affirmed an award of \$20,000.00 in emotional damages where complainant felt isolated and depressed, her hair fell out in patches, and she suffered an increase in blood pressure because of the stress caused by Respondent’s racially discriminatory conduct. Respondent had removed complainant from her classroom and assigned her to the district office for refusing to sign a sick leave form, which complainant had refused to sign because she was not sick. At the district office, complainant was forced to sit in a room by herself for several months. Instead of sending her paychecks to the district office where she was assigned, Complainant endured embarrassment by being forced to return to her school to receive her paycheck, where she would come into contact with her former students. Additionally, Respondent televised three warning resolutions complainant had received on the televised educational access station and placed the warnings in a written report that was distributed to all the schools, the principals and the district superintendents. Subsequently, Complainant was suspended without pay for 2 ½ years. Complainant felt helpless to affect her situation because no action was taken when she reported the adverse treatment up the chain of command.

I further considered the examination of emotional injury awards in housing discrimination cases by The City of Chicago Commission on Human Relations as presented in **Nash/Demby v. Sallas & Sallas Realty**, 92 –H-128 (May 17, 1995), and also cited in **Garrity and Lockett**, __ Ill.HRC Rep. __, (1992CN0538, May 3, 1996). The Chicago Commission analysis concluded that damage awards more than \$10,000.00 had one or more of the following features present:

- a. detailed testimony revealed specific effects of the discriminatory conduct;
- b. the conduct took place over a prolonged period;
- c. the effects of the mental distress were felt over a prolonged period of time;
- d. the mental distress was accompanied by physical manifestations and/or medical or psychiatric treatment;
- e. the discriminatory conduct was particularly egregious involving sexual epithets and/or actual malice; or
- f. complainant was particularly vulnerable.

Because the evidence here supports that at least three of the six features were present: 1) the discriminatory conduct took place over a prolonged period; 2) the mental distress was accompanied by physical manifestations; 3) and the discriminatory conduct was particularly egregious involving actual malice; the requested \$20,000.00 is an appropriate amount to compensate Complainant for his emotional distress.

Prejudgment Interest

Finally, Complainant is entitled to prejudgment interest calculated in accordance with 56 Ill.Admin.Code, Section 5300.1145.

RECOMMENDATION

Accordingly, it is recommended that the Complaint in this matter be sustained on the age discrimination claim and that Complainant be awarded the following relief:

- A. Respondent pay to Complainant lost backpay in the amount of \$67,714.00;
- B. Respondent pay to Complainant lost medical benefits in the amount of \$10,184.00;
- C. Respondent pay to Complainant \$20,000.00 in emotional distress damages;
- D. Respondent pay to Complainant prejudgment interest on the amounts in A and B to be calculated as set forth at 56 Ill.Admin.Code, Section 5300.1145;
- E. Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;
- F. Respondent cease and desist from discriminating on the basis of age;
- G. Respondent pay to Complainant the reasonable attorney's fees and costs incurred in the prosecution of this matter, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1982), said motion and affidavit to be filed within 21 days after the service of the Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees and costs;
- H. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees;

- I. The recommended relief in paragraphs A through F is stayed pending resolution of the issue of attorney's fees and issuance of a final Commission order.

HUMAN RIGHTS COMMISSION

ENTERED: September 9, 2003

By: _____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section